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Dear Senators:

HB 5002, in its original and current form, guts the Michigan Workers' Disability Compensation Act in two radical ways. The bill would require employers and employees to hire completely unnecessary vocational consultants every time an injured worker is injured in order to determine whether the worker has a disability and to determine the amount of benefits payable.

An injured worker in Michigan, off of work due to an injury, has never before been required to hire a vocational consultant in order to receive weekly workers' compensation benefits. The current statute does not require it. The Michigan Supreme Court in *Stokes*, its last published decision on the issue, specifically indicated that an injured worker is <u>not</u> required to hire a vocational consultant or prepare a formal "transferable skills' analysis in order to receive benefits to replace lost wages. Nevertheless, the proponents of HB 5002 with its new definition of disability would require this unnecessary expense every time a worker is injured. The proponents of this bill claim to be codifying existing Supreme Court precedent. Yet this bill would require what the conservative Justices on the Supreme Court did <u>not</u> require in *Stokes*. If every work injury requires a battle of vocational consultants to determine whether a claimant is disabled, it will increase exponentially the costs for employers and employees alike. The State Bar of Michigan's Workers' Compensation Section Council has proposed an alternative definition of disability, drafted and agreed upon by both employer and employee representatives, that would more efficiently reduce costs for both sides without the need for paid vocational consultants. The Section Council's language should be adopted instead.

The second radical change in HB 5002 would allow employers or carriers to reduce benefits by imaginary wages that a claimant has not been offered. Under Michigan law for 75 years, an employer can terminate benefits if an injured worker is *offered* a job the worker can do, and the employee refuses to perform it. Under current law, if a claimant refuses to *seek* work, benefits can also be suspended for failure to participate in vocational rehabilitation efforts. Under HB 5002 however, a worker's benefits would be reduced if an insurance adjuster believes a worker has a "wage earning capacity" even if no work is actually being offered. If the adjuster thinks a claimant has a wage earning capacity because he or she thinks there is work "reasonably available" to the worker, benefits will be reduced by what such jobs pay. Under the bill's language, adjusters can and

will read the want-ads or surf the Internet, inform the claimant that benefits that are being slashed based upon what the adjuster saw in the paper or online. The adjuster may or may not send a list of jobs to the claimant before or after benefits are slashed. The claimant will then try to find out what these jobs are, apply for them–and then, typically wait a year or two for a hearing, to try to get their benefits reinstated by establishing that the jobs were not "reasonably available" to the claimant. This proposed reduction for phantom wages is cruel to workers. An injured worker needs a way to support a family, either by receiving workers' compensation wage loss checks–or by obtaining a real job that has actually been offered. A letter from an adjuster asserting the existence of jobs does not put food on the table in the way a workers' compensation check or an actual job offer can.

Even though it is illegal in Michigan under longstanding legal doctrine to reduce a worker's benefits by a worker's hypothetical wage earning capacity, some insurance companies in the last couple years have tried doing so anyway. The proponents of HB 5002 promise this reduction of benefits will only occur when jobs are "reasonably available." Yet how will this really work in practice? Consider my client, Eric Williams, a painter, who suffered a serious injury to his right dominant hand at work that became infected and required five surgeries. The workers' compensation adjuster slashed his weekly workers' compensation benefits from $419.86 to $92.10, by sending him a letter indicating that there was "available" work that he could perform. With the letter, the adjuster attached a list Mr. Williams had never seen before which identified the jobs which were supposedly available. The insurance adjuster also suggested in her letter that Mr. Williams respond by entering into a quick settlement without the assistance of a lawyer. After his benefits were reduced, Mr. Williams tried submitting applications to all of the companies on the list. One company told Mr. Williams it had no work within his physical restrictions. Five other companies took his application but offered him no work. Another five companies on the list told Mr. Williams they were not even taking applications. Another company advised Eric that it had specifically told the worker's compensation carrier to stop lying to people and telling them that it had available work. When the insurance company reduced Mr. Williams' benefits, he could not support his family and he lost his home through foreclosure. Given the false assertions of the carrier in his case, under the current law, we sued the insurance company for fraud. HB 5002 would instead institutionalize this practice and allow insurance companies to routinely reduce benefits by falsely asserting that jobs are available which the claimant is not actually offered and cannot obtain. With this proposed legislation, the Legislature is, in essence, being asked to legalize and institutionalize this form of insurance fraud.

The proponents of this bill have reassured legislators in their testimony that benefits will only be reduced if there is a *suitable* or *bona fide,* job reasonably available to the worker. The proponents of this bill claim, for example, that an injured police officer will not be required to drive around the state looking for lawns to mow in order to get an unreduced workers' compensation check. They claim that benefits will not be reduced if, for example, a worker is undergoing medical treatment in a hospital. The existing language in the bill however doesn't directly speak to these issues. It allows benefits to be reduced if there is work "reasonably available to the employee." Because the Michigan Supreme Court may decline to review the legislative record to determine the intent of the proponents of this legislation, it is important that you as legislators choose language

carefully that prevents such unfair results. If an injured worker is not going to be required to hire in as a telemarketer while they lie in bed or be required to ring doorbells looking for lawns to mow, the language in the bill ought to make that clear. Instead of allowing an adjuster to reduce benefits if he or she thinks there is "reasonably available work," the Legislature should reaffirm that weekly wage loss benefits should be reduced by actual wages earned. This is what the Workers' Compensation Section Council recommends in its proposal. If the Legislature wants to create additional incentives to get slackers back to work, it could add language that permits a magistrate to suspend or reduce benefits if a partially disabled worker, after maximum medical improvement, unreasonably refuses to seek suitable bona fide employment which will restore the worker's earnings in a remunerative occupation. Such language would be fairer than language that permits adjusters to reduce benefits whenever he or she determines there is a job somewhere in the universe the claimant is capable of performing (that has not been offered).

The proposed definition of disability in HB 5002 will drastically increase the costs of litigation for both employers and employees by requiring each side to hire expensive vocational consultants. HB 5002's proposed formula for determining a claimant's benefit rate will also be very costly to business as it will require litigation every time a worker is injured to determine the proper benefit rate. If a worker's benefits can be reduced by wages not actually offered, an employer will lose the incentive to bring an injured worker back to work. When these workers are denied workers' compensation benefits, taxpayers will be asked to pick up the tab when these workers seek state disability assistance, Medicaid and other relief from the State. Please take the time to consider the implications of the radical proposals contained in this bill. Please consider instead the alternative proposals put forward by the bipartisan Workers' Compensation Section Council, by those in the trenches who understand the system the best, and understand how it can be improved to benefit everyone.

Respectfully Yours,

Robert J. MacDonald